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# Criminal Sentencing Case Law Update

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# Webinar Rules

Q&A

Follow Up Survey

Access recent cases here and statutes here.

Agency Updates

Unpublished Opinions

Overview

# Criminal Threat

Reckless Disregard provision held unconstitutional in *Boettger*

- The Kansas Supreme Court found that the provision in the Kansas criminal threat statute, K.S.A. 2018 Supp. 21-5415(a)(1), that allows for a criminal conviction if a person makes a threat in reckless disregard of causing fear is unconstitutionally overbroad. See *State v. Boettger*, 310 Kan. 800, 801, 450 P.3d 805 (Kan. 2019).
- K.S.A. 21-5415(a)(1)"A criminal threat is any threat to: Commit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, **or in reckless disregard of the risk of causing such fear or evacuation**, lock down or disruption in regular, ongoing activities…"
- Conviction based on the reckless disregard provision

# *State v. Johnson*, 310 Kan. 835, 450 P.3d 790 (2019)

- Son tore the phone off the wall and threatened to kill mother and burn her house down
- Incidents downplayed at trial by mother and defendant's wife
- Testified that they commonly threaten to kill each other but don't mean it
- Court looked at the context and time of his threats
- State presented sufficient evidence on both alternative means, however, Court still reversed
- Implicates defendant's right to unanimous verdict
- No way to show that the jury unanimously agreed that defendant acted intentionally
- Can't be constitutionally convicted of a statute that's constitutionally invalid

# *State v. Lindemuth*

- Dispute between truck driver, and defendant, owner of parking lot
- Truck driver left trailer on property; Defendant refused to tell anyone where trailer was
- Truck driver's boss (Oklahoma) gets involved, tells defendant he's coming up there, defendant allegedly threatens to kill him after that
- Trial court instructed jury on both mental states (intentional + reckless), Jury instructions/state's argument did not direct the jury to one mental state or another
- See *State v. Lindemuth*, 470 P.3d 1279 (Kan. August 28, 2020).
- Reversed

# *State v. Lindemuth* cont'd.

- "We agree the jury may have believed that in Matthews' version of the conversations, Lindemuth simply spoke in the heat of argument and the result of unthinking rage—more reckless, impulsive bluster than an intentional threat. For example, Matthews testified he volunteered to Lindemuth that "I know that you're toting a pistol, but I'm coming up there [to Topeka]. And . . . you're either going to give me that trailer back [or] we're getting into it." And per Matthews, Lindemuth immediately responded to this ultimatum with, "'I'll just shoot ya. You come up here, I'll kill you." *State v. Lindemuth*, 470 P.3d 1279, 1284 (Kan. August 28, 2020).

# K.S.A. 21-6810(d)(9)

"Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes." K.S.A. 2020 Supp. 21-6810(d)(9).

# Restitution Plan

- As part of plea agreement, defendant agreed to pay restitution, at restitution hearing over $50k in restitution ordered (J&S with codefendant)
- "pay restitution as directed" a condition of probation, but no plan made
- The court must establish the plan
  - The plan can be monthly installments
  - Could be due immediately
  - Court cannot delegate to others
- See *State v. Roberts*, 57 Kan.App.2d 836, 461 P.3d 77 (Kan. App. 2020).

# Restitution Plan cont'd.

- Legislation passed in 2020
- K.S.A. 21-6604(b)(1) states in part, "(b) (1) In addition to or in lieu of any of the above, the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime. Restitution shall be due immediately unless: (A) The court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part."

# Unworkable Restitution

- Sentenced to prison for life without parole
- ordered to pay $5000 in restitution
- At the beginning of the case, judge found defendant was indigent; acknowledged at sentencing that the restitution would never be paid
- Judge did not explicitly order payments to be made from prison
- In a case where the defendant was sentenced to life without parole, the Kansas Supreme Court found that an unworkable order of restitution was imposed because the district court acknowledged that the amount would never get paid, the defendant would be in prison for life and the court did not order restitution be paid from prison. *See State v. Tucker*, 311 Kan. 565, 568, 465 P.3d 173 (2020).

# Criminal Possession of a Weapon By Convicted Felon

- Convicted felon; pulled out pocketknife during altercation
- K.S.A. 21-6304(c) "As used in this section: (1) "Knife" means a dagger, dirk, switchblade, stiletto, straight-edged razor ***or any other dangerous or deadly cutting instrument of like character***; and (2) "weapon" means a firearm or a knife.
- The Kansas Supreme Court held the residual clause in the statute prohibiting possession of weapon by convicted felon, K.S.A. 2019 Supp. 21-6304, defining weapon as "any other dangerous or deadly cutting instrument of like character" is unconstitutionally vague because it fails to provide an explicit and objective standard of enforcement. See *State v. Harris*, 311 Kan. 816, 467 P.3d 504 Syl. ¶ 1 (2020).
- Leads to arbitrary enforcement of inherently subjective standard

# Criminal History Calculation

# Out-of-state convictions

- *State v. Wetrich*
- "identical or narrower test"
- For an out-of-state conviction to be comparable to an offense under the Kansas criminal code, the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced. *State v. Wetrich*, 307 Kan. 552, 559, 412 P.3d 984 (2018).

# Prior out-of-jurisdiction DUI convictions

- K.S.A. 8-1567(j)
- (j)For the purposes of determining whether an offense is comparable, the following shall be considered: (1) The name of the out-of-jurisdiction offense; (2) the elements of the out-of-jurisdiction offense; and (3) whether the out-of-jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense.

POLL

# Does the *Wetrich* test apply to out-of-state DUI convictions?

# *State v. Mejia*

- Defendant had 3 prior Missouri convictions that were used to elevate the DUI from a misdemeanor to a felony

The Court of Appeals ruled that the holding in *Wetrich* does not apply to DUI cases because the Legislature has amended K.S.A. 8-1567 to permit charging and sentencing enhancements for DUIs based on out-of-state convictions under statutes that are comparable to Kansas law—meaning "similar to" rather than the same as or narrower than Kansas law. See *State v. Mejia*, 58 Kan.App.2d 229, 466 P.3d 1217 (Kan. App. 2020).

# *State v. Myers*

A panel of the Court of Appeals recently held that prior out-of-state DUI convictions should only be used to calculate a defendant's criminal history if the elements of the statute are identical to or narrower than the Kansas DUI statute. See *State v. Myers*, 475 P.3d 1256, 1264 (Kan. App. October 2, 2020).

# Prior Conviction Comparisons

- K.S.A. 21-6811(e)(3)(B)

(e) (1) Out-of-state convictions and juvenile adjudications shall be used in classifying the offender's criminal history.

(3)The state of Kansas shall classify the crime as person or nonperson.

(B) In designating a felony crime as person or nonperson, the felony crime shall be classified as follows:

(i) An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, shall be classified as a person felony if one or more of the following circumstances is present as defined by the convicting jurisdiction in the elements of the out-of-state offense:

(a) Death or killing of any human being;

(b) threatening or causing fear of bodily or physical harm or violence, causing terror, physically intimidating or harassing any person;

(c) bodily harm or injury, physical neglect or abuse, restraint, confinement or touching of any person, without regard to degree;

(d) the presence of a person, other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance;

# Prior Conviction Comparisons Cont'd.

- K.S.A. 21-6811(e)(3)(B)

(e) possessing, viewing, depicting, distributing, recording or transmitting an image of any person;

(f) lewd fondling or touching, sexual intercourse or sodomy with or by any person or an unlawful sexual act involving a child under the age of consent;

(g) being armed with, using, displaying or brandishing a firearm or other weapon, excluding crimes of mere unlawful possession; or

(h) entering or remaining within any residence, dwelling or habitation.

(ii) An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, shall be classified as a person felony if the elements of the out-of-state felony offense that resulted in the conviction or adjudication necessarily prove that a person was present during the commission of the offense. For purposes of this clause, the person present must be someone other than the defendant, a charged accomplice or another person with whom the defendant is engaged in the sale, distribution or transfer of a controlled substance or non-controlled substance. The presence of a person includes physical presence and presence by electronic or telephonic communication.

(iii) An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, shall be classified as a nonperson felony if the elements of the offense do not require proof of any of the circumstances in subparagraph (B)(i) or (ii).

# *State v. Baker*

The Court of Appeals found that, "the Kansas Legislature amended K.S.A. 21-6811(e)(3), adding subsection B, and providing a new framework for deciding whether prior out-of-state crimes should be classified as person or nonperson offenses in calculating criminal history when a defendant is sentenced on or after May 23, 2019, the date the amended statute became effective. This framework, which requires a sentencing judge to compare the enumerated circumstances listed in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i) or (ii) to the elements of the prior out-of-state conviction, legislatively overrules the comparable offense analysis previously required by the rule in *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018)." *State v. Baker*, 475 P.3d 24, Syl.¶ 3 (Kan. App. 2020).

# Criminal History Calculation Cont'd.

# *State v. Keel* Applied

- Convicted of Attempted Failure to Register as a Drug Offender when the offense was a person felony
- When defendant committed current crime, the prior Attempted Failure to Register as a Drug Offender was a non-person felony

In a case where the defendant committed attempted failure to register as a drug offender when the offense was a person felony, the Court of Appeals recently applied Keel to rule that the prior registration offense should be classified as a non-person felony because when the defendant committed the current conviction, the failure to register offense was classified as a nonperson felony. See *State v. Timmons*, No. 120,251, 2020 WL 2503273 at *5 (Kan. App. 2020)(unpublished opinion).

# Prior Missouri Ordinance Violation

- 3 Missouri ordinance violations treated as person misdemeanors, converted to one PF
- 2x Assault, violation of PFA
- Missouri ordinance violations are considered quasi-criminal and not considered crimes under Missouri law
- KCMO Municipal Code does not score these violations as felonies or misdemeanors, even though others are
- The violations could not be used to determine the defendant's criminal history score because municipal ordinance violations are not crimes under Missouri state law. See *State v. Cross*, No. 121,517, 2020 WL 5079891 at *4 (Kan. App. 2020)(unpublished opinion).

# Convictions used for Criminal History & to elevate current offense

Nongrid & Grid examples (Domestic Battery, Burglary, Persistent Sex Offender)

- *Pearce* (Burglary)
- *Fowler* (Domestic Battery)
- *Williams* (most recently decided, persistent sex offender)

# *State v. Pearce*

- Sentencing for 5th burglary
- District Court did not include a prior residential burglary in his criminal history score (this conviction had already been used to make the sentence prison instead of probation under recidivist burglar special rule)
- K.S.A. 21-6810(d)(10): Prior convictions of any crime shall not be counted in determining the criminal history category if they enhance the severity level, elevate the classification from misdemeanor to felony, or are elements of the present crime of conviction. Except as otherwise provided, all other prior convictions will be considered and scored.
- None of the exceptions listed applied to Pearce, so his prior residential burglary should have been included.
- See *State v. Pearce*, 51 Kan.App.2d 116, 342 P.3d 963 (2015).

# Convictions used for Criminal History & elevate current offense cont'd.

- Defendant convicted of Possession of Methamphetamine, Violation of Protective Order and Felony Domestic Battery
- Defendant's two prior misdemeanor Domestic Battery convictions were used to calculate his criminal history for the primary grid conviction (Possession of Meth) as well as to elevate the current Domestic Battery charge from a misdemeanor to a felony
- Defendant argued this violated the rule against "double counting"

Kansas Supreme Court held that a sentencing judge's use of the same two prior misdemeanor domestic batteries both to calculate a defendant's criminal history for his or her base sentence on a current primary grid crime and to elevate a current domestic battery to a felony does not violate K.S.A. 2015 Supp. 21-6810(d)(9)'s restriction on double counting. *State v. Fowler*, 457 P.3d 927 Syl. ¶ 2 (Kan. 2020).

# State v. Williams

- Defendant had 3 prior person offenses: one conviction for aggravated indecent liberties with a child and two convictions for indecent liberties with a child.
- PSI writer listed defendant's criminal history as "B", State argued it was "A"
- District court ruled that criminal history score should be "A" and classified defendant as persistent sex offender
- The Court of Appeals held that the defendant's prior offense could be used both to calculate his criminal history score and to classify him as a persistent sexual offender because the prior conviction was not used to enhance the severity level of his current offense, it did not change his current offense from a misdemeanor to a felony, and it was not used as an element of his current offense under K.S.A. 2016 Supp. 21-6810(d)(9). See *State v. Williams*, No.121,571, 2020 WL 5849347 at *2 (Kan. App. 2020) (unpublished opinion).

# PROGRESSIVE SENTENCING IN FORGERY KSA 21-5823 SPECIAL RULES 16 AND 17

Progressive Sentencing = Penalty for Forgery is enhanced with subsequent conviction e.g.
1st= $500 or FI* (lesser)
2nd =30 days imprisonment as condition of probation + $1000 or FI* (lesser)
3rd = 45 days imprisonment as condition of probation + $2500 or FI* (lesser)
See K.S.A. 21-5823(b).
*Forged Instrument

Are forgeries in the same complaint?

Yes

If using multiple forgery convictions for progressive sentencing in same case, the Court should specify which count of forgery will be the 2nd, 3rd, or Sub.
See *State v. Gilley*, 290 Kan. 31 (2010),
*See also State v. Arnett*, 290 Kan. 41 (2010).

No

Though there are no cases directly on point, the recent cases of *Pearce*, 342 P.3d 963 (Kan. App. 2015), *Fowler*, 408 P.3d 119 (Kan.App. 2017), and *Williams* 473 P.3d 384 (Kan. App. 2020) (unpublished) seem to indicate that prior forgery convictions can be used both for progressive sentencing and to calculate the criminal history score.

# Probation

Revocations & Extensions

- K.S.A. 22-3716
- K.S.A. 21-6608

# K.S.A. 22-3716

- Allows for revocation without prior sanction if one of the exceptions listed in K.S.A. 22-3716(c)(7) apply:
  - (A) The court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by such sanction;
  - (B) the probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction was originally granted as the result of a dispositional departure granted by the sentencing court pursuant to K.S.A. 2020 Supp. 21-6815, and amendments thereto;
  - (C) the offender commits a new felony or misdemeanor while the offender is on probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction; or
  - (D) the offender absconds from supervision while the offender is on probation, assignment to a community correctional services program, suspension of sentence or nonprison sanction.

# K.S.A. 22-3716 Cont'd.

- K.S.A. 22-3716(c)(1)(C) allows for revocation after defendant has served a 2/3 day quick dip in jail
- 120/180 prison sanctions eliminated by legislation in 2019

# Probation Revocation- Dispositional Departure Exception

- Revoked from probation with dispositional departure exception
- Committed original crimes before statute's effective date (July 1, 2017)

The Kansas Supreme Court held that "….the K.S.A. 2017 Supp. 22-3716(c)(9)(B) exception, which allows a trial court to revoke a probationer's probation without first imposing graduated sanctions if the probation was granted as a result of a dispositional departure, applies only to probationers whose offenses or crimes of conviction occurred on or after July 1, 2017." *State v. Coleman*, 311 Kan. 332, 337, 460 P.3d 828 (2020).

# Use of 120/180 day Sanctions

- Defendant committed offense in November 2017; placed on probation
- Defendant asked for a 180 day sanction at PV hearing, he was revoked instead
- The district court did not believe the 120/180 sanctions were still available

The Court of Appeals held that the statutory amendment eliminating the 120/180 day probation violation sanctions only applies to probationers who committed their underlying crimes after July 1, 2019. See *State v. Ratliff*, No. 121,800, 2020 WL 2097488 at *2 (Kan. App. 2020) (unpublished opinion).

# *State v. Dominguez*

The Court of Appeals held that the 2019 amendment to the intermediate sanctioning scheme at K.S.A. 22-3716 does not apply retroactively to probation violators whose crimes were committed before the effective date of the amendment. *State v. Dominguez*, 473 P.3d 932, 937 (Kan. App. 2020).

# *State v. Trevitt*

- K.S.A. 21-6608(c)(6) states that "except as provided in subsections (c)(7) and (c)(8), the total period in all cases shall not exceed 60 months, **or the maximum period of the prison sentence that could be imposed** whichever is longer…"
- Defendant was placed on probation with an underlying prison sentence of 64 months
- Defendant's probation was extended about 33 months past the original end date, placing him on probation for 69 months total
- Defendant argued that probation could not exceed 64 months whereas the state argued that probation could be extended to the maximum amount of time that COULD have been imposed at sentencing
- Here, where the probation term became longer than the underlying sentence, the Court of Appeals found the extension violated K.S.A. 2019 Supp. 21-6608(c)(8) because the statute caps probation time on the sentence imposed rather than the most prison time the district court could have imposed at sentencing. See *State v. Trevitt*, No. 122,168, 2020 WL 6811983 at *3 (Kan. App. 2020) (unpublished opinion).

# MISCELLANEOUS

# Special Rule 10

When a new felony is committed while the offender is on release pursuant to article 28 of chapter 22 (Conditions of Release) of the Kansas Statutes Annotated, or similar provisions of the laws of another jurisdiction, a new sentence may be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2020 Supp. 21-6606 and the sentencing court may sentence an offender to imprisonment for the new conviction, even if the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime committed while on release for a felony does not constitute a departure. K.S.A. 2020 Supp. 21-6604(f)(4). However, K.S.A. 2020 Supp. 21-6606(d) 47 indicates that any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released.

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# Concurrent vs. consecutive

The Court of Appeals ruled that when Special Rule 10 applies (defendant committed new felony while on felony bond), the sentencing judge is required to run the sentences consecutively unless the defendant shows manifest injustice. See *State v. Vaughn*, 58 Kan.App.2d 585, 597-8, 472 P.3d 1139 (Kan. App. 2020).

When multiple sentences in different cases are imposed on the same day, the Kansas Court of Appeals ruled that a judge has the discretion to impose concurrent or consecutive sentences regardless of the mandatory provisions of K.S.A. 2019 Supp. 21-6606 (c), (d), and (e). *State v. Dunham*, 58 Kan.App.2d 519 , 472 P.3d 604, Syl. ¶ 3 (Kan. App. 2020).

# KORA Deadly Weapon

- Defendant robbed a Dollar General store using a Taser
- District Court found that a dangerous weapon was used; defendant required to register as violent offender

The Kansas Supreme Court ruled that a Taser used by the defendant in an aggravated robbery is a deadly weapon for purposes of the Kansas Offender Registration Act (KORA). See *State v. Carter*, 311 Kan. 206, 213, 459 P.3d 186 (2020). Although the district judge made an oral finding that there was a "dangerous weapon involved", instead of the finding required by statute, the Court found that indicating a deadly weapon was used in the commission of the crime on the journal entry was enough to satisfy the requirement for KORA. See *id*. at 3

- Strong dissent

# KORA Notice Requirement

- Aggravated Battery plea, ordered to register as Violent Offender at sentencing
- Juarez' crime was not listed in K.S.A. 2019 Supp. 22-4902(e)(1) as a crime that automatically required registration
- Court did not notify him of his duty to register under KORA at time of plea
- Notified of registration requirement at sentencing; defendant had remained in custody between plea and sentencing
- No procedural due process violation b/c no prejudice, important to Court that he was still incarcerated, no prejudice b/c he couldn't violate KORA (no responsibility to register yet)
- See *State v. Juarez*, 470 P.3d 1271 (Kan. August 28, 2020).

# Burglary

- Defendant convicted of burglary of a dwelling
- Owner of building testified that no one lived there at the time; no plans to rent it out
- People had lived there 2 years prior, but empty at the time of burglary
- In a burglary of a dwelling case, where the owner testified that no one lived at the building and he had no plans to live there or rent it out, the Kansas Supreme Court found the dwelling requirement was not met because there was no present, subjective intent that the building be used as a dwelling. See *State v. Downing*, 311 Kan. 100, 456 P.3d 535 (2020).
- State's evidence establishes a preference rather than intent

# Hard 25

- Armed Robbery; victim killed by accomplice of Defendant
- Defendant was 19 at time of crime
- The Kansas Supreme Court recently held the hard 25 life sentence is not categorically disproportionate as applied to young adults convicted of felony murder. *State v. Patterson III*, 311 Kan. 59, 77, 455 P.3d 792 (2020).

# Williams v. State

- In a case where a juvenile offender convicted of premediated first-degree murder was sentenced to a hard 50 sentence, the Court of Appeals remanded the case back to the district court to determine whether imposing a hard 50 sentence was constitutionally disproportionate under the Eighth Amendment. See *Williams v. State*, 476 P.3d 805, 825 (Kan. App. 2020).
- The Court held that the Eighth Amendment prohibits sentencing a juvenile to life without parole unless he or she is "the rare juvenile offender whose crime reflects irreparable corruption" and that this prohibition applies regardless of whether the sentencing scheme is construed as mandatory or discretionary. *Id*. at 817-818. Additionally, the Court held that the defendant's hard 50 sentence is the functional equivalent of life without parole. See *id*. at 822.
- Lastly, the Court held that a sentencing court cannot impose a hard 50 sentence on a juvenile offender convicted of premediated first-degree murder without first considering the offender's youth and attendant characteristics, including the child's diminished culpability and heightened capacity for change, while keeping in mind that such a sentence is constitutionally disproportionate for all but the rarest of children whose crimes reflect irreparable corruption. *Id*. at 824.

# Departure Reasons

The Court of Appeals held that a defendant's lack of prior convictions for domestic violence offenses is not a substantial and compelling reason to depart from the presumptive sentence. See *State v. Montgomery*, No. 122,237, 2020 WL 4249425 at *3 (Kan. App. 2020)(unpublished opinion).

- Defendant's use of violence was significant to the court
  - At least one prior conviction that involved violent act; released from postrelease just a few days before this crime occurred

# Lifetime parole

In a case where the defendant's consecutive sentences included both on-grid and off-grid offenses, the Kansas Supreme Court held that the defendant should have been sentenced to lifetime parole because the supervision period following his prison release should be based on his off-grid offenses. See *State v. Satchell*, 311 Kan. 633, 648, 466 P.3d 459 (2020).

# Constitutional Argument

The Court of Appeals held that Kansas law requiring lifetime supervision on convictions for sexually violent crimes does not violate equal protection of the law under the Equal Protection Clause of the Fourteenth Amendment as compared to other offenders convicted of serious offenses because the groups are not similarly situated in light of the special risk of recidivism for sexually violent offenders and need for greater supervision after release. See *State v. Little*, 58 Kan.App.2d 278, 279, 469 P.3d 79(Kan. App. 2020).

# Comments or Questions?

# Contact Information

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